RESPONSE NOT PRINTED

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IN THE

Supreme Court of the United States

October Term, 1968.

No. 636

HOWARD YEAGER, Principal Keeper of the New Jersey State Prison,

Petitioner,

vs.

SYLVESTER JOHNSON and STANLEY CASSIDY,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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STATUTE:

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1968.

No.

HOWARD YEAGER, PRINCIPAL KEEPER OF THE NEW JERSEY STATE PRISON,

Petitioner,

VS.

SYLVESTER JOHNSON AND STANLEY CASSIDY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on August 23, 1968.

CITATION TO OPINION BELOW.

The Cpinion of the United States Court of Appeals for the Third Circuit is unreported and is printed in Appendix A hereto.

JURISDICTION.

The Opinion of the United States Court of Appeals for the Third Circuit was entered on August 23, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Whether *Bruton v. United States* and *Roberts v. Russell* do and should require reversal where there has been no actual prejudice to defendants?

2. Whether *Bruton v. United States* and *Roberts v. Russell* do and should require reversal where substantially identical confessions are used which do not contribute to the convictions?

3. Whether this court should further implement its holding in *Roberts v. Russell*, where:
   (a) Conviction appealed from was entered 1959 and there has been reliance on existing law;
   (b) Defendants admitted truth of substantially identical confessions at trial?

STATEMENT.

Shortly after 6:00 P. M. on the evening of Friday January 24, 1958, Edward J. Davis, who owned and operated a toy shop at 1731 Broadway (next door to the northwest corner of Broadway and Ferry Avenue, Camden, New Jersey) (NJ/JA 43a-44a), came running out of his store calling for help (NJ/JA 44a). He was heard to shout, "Help! I am shot" (NJ/JA 54a). He was bleeding profusely (NJ/JA 56a-57a). He collapsed to the sidewalk from the arms of one of his neighbors who rushed to his aid (NJ/JA 24a-32a). The police were notified and within a few minutes thereafter, a police patrol car ambulance rushed Davis to the hospital (NJ/JA 75a). Approximately thirty-five minutes after entering the hospital, Davis died (NJ/JA 98a).

Subsequent examination revealed the presence of seven gunshot wounds on Davis' body (NJ/JA 112a). The medical examiners concluded that Davis had been shot four times (NJ/JA 112a-116a). There were no powder burns on the body (NJ/JA 119a). One bullet entered the right side of the nose, another in the right cheek bone and a third in the neck at the left of the Adams apple (NJ/JA 116a-117a), with the fourth entering through the left groin.

Death resulted from hemorrhage due to the perforating wound of the liver and right lung which, in turn, was caused by the bullet which entered the body through the left groin and passed upward through his small bowel, liver, lung and posterior wall of his chest (NJ/JA 117a-118a).

At the time he was admitted to the hospital he had $294.24 in cash on his person (NJ/JA 95a).

The first leading clue to the solution of the murder came from a witness who, while waiting for a red traffic signal

at the corner of Fourth Street and Ferry Avenue, observed the automobile belonging to defendant, Wayne Godfrey, going through the red light and turning into Ferry Avenue. He noted the license number and general description of the vehicle. He also noted that the vehicle stopped on Ferry Avenue between Fourth and Third Streets and started up again (NJ/JA 185a-186a). When this motorist learned of Davis' death, he remembered the motor vehicle violation occurred at about the same time as the homicide (NJ/JA 189). He thereupon notified the police of the license number, who learned that the car was registered in the name of Wayne Godfrey.

The State proved that several days before the murder, Cassidy called at Brimm's house and obtained from him his .25 calibre automatic, under the pretense of holding it for him. Cassidy returned the gun to Brimm on Friday, January 24th, about 7:00 or 8:00 P. M. (NJ/JA 249a-252a); on the night preceding the attempted robbery of Davis, Godfrey called at his friend, Walker's home and borrowed Walker's loaded .32 calibre revolver. It later turned out to be the murder weapon (NJ/JA 227a-241a; 264a-268a). Godfrey returned the murder weapon to Walker on Friday night after the shooting (NJ/JA 229a-231a).

Noah Hamilton testified that six or eight weeks before the fatal shooting he had a conversation with defendant, Godfrey, at which time, Godfrey asked him if he wanted to make some money and suggested a hold-up of a toy store at Broadway and Ferry Avenue (NJ/JA 287a-289a). Hamilton further stated that he met Godfrey about 9:00 or 10:00 o'clock in the evening of Friday, January 24th, at a taproom. He stayed with Godfrey at the taproom till about midnight when they drove off to meet Godfrey's wife (NJ/JA 269a-271a). While waiting for Godfrey's wife to appear, Godfrey asked Hamilton to buy a newspaper and look for a hold-up and shooting at Broadway and

Ferry Avenue. When Hamilton told Godfrey about the newspaper account of a holdup and shooting at Broadway and Ferry Avenue, Godfrey said, "That was it" (NJ/JA 273a-275a).

The three defendants with the two previously secured guns arranged to rob the victim, and pursuant to their plan, Godfrey drove his car to Cassidy's home. There he picked up Cassidy and Johnson and drove them to Broadway and Ferry Avenue. He parked his car around the corner. Godfrey waited in the get-away car; Johnson and Cassidy, both armed with the guns, entered the Davis toy store and pretended to be shoppers. While there, Johnson fingered a toy truck. After surveying the premises, they both left and returned to the Godfrey car. The three of them discussed the matter between themselves. Cassidy and Johnson decided to return to the store and go through with their plan to rob Davis and take the toy truck with them that Johnson realized already carried his fingerprints.

Still armed with the previously secured guns, Cassidy, with the gun that he obtained from Brimm, and Johnson with the revolver that was obtained for him by Godfrey, returned to the Davis store. Cassidy attempted to attract Davis to the rear of the store. Davis followed him. Johnson was in back of Davis. When they reached about the center of the store, Johnson, with his loaded gun drawn, announced to Davis, "This is a stick-up." Davis resisted. He made some effort to rebuff Johnson. In turn, Johnson started to fire his gun and shot Davis four times. Davis, mortally wounded, staggered out through the front of his store to the sidewalk. Cassidy and Johnson escaped. Cassidy ran back to the car where Godfrey was waiting. Johnson ran down Ferry Avenue where he was picked up by Godfrey a few minutes later, about a block and a half away. Godfrey dropped Johnson off near his home and Cassidy near his.

The following day, Johnson, accompanied by Cassidy and Godfrey, took flight to Newark. Noah Hamilton accompanied them. Godfrey, Cassidy and Hamilton returned to Camden later that night. Johnson remained in Newark until he was apprehended by the police.

The police took Godfrey into custody on Tuesday afternoon, January 28, 1958 (NJ/JA 197a), at 4:00 A. M., the following morning, January 29th, Cassidy was arrested (NJ/JA 201a) and Johnson was apprehended in Newark late in the afternoon of the same day (NJ/JA 204a).

All three of the defendants confessed to their participation in the attempted robbery and the murder (Cassidy, NJ/JA 458a-480a, 492a-495a; Godfrey, NJ/JA 508a-539a, 542a-547a; Johnson, NJ/JA 555a-581a).

At the trial of the defendants, the trial court heard testimony on the questions of the admissibility of the defendants' confessions out of the presence of the jury (NJ/JA 85a-206a). In the case of Stanley Cassidy, Chief of Detectives Dube testified that prior to taking the defendants' statement, Cassidy was warned of his rights and informed of the nature of the crime under investigation. Chief Dube stated to the defendant, Cassidy:

> "I am going to ask you some questions as to what you know about the hold-up, but before I ask you these questions, it is my duty to warn you that everything that you tell me must be of your own free will, must be the truth, and without any promises or threats made to you, and knowing anything you tell me can be used against you, or any other person, at some future time" (NJ/JA 459a).

Chief Dube further testified that there were no threats, promises, acts of violence or intimidation (NJ/JA 115a).

At the conclusion of Chief Dube's testimony, the defendant, Cassidy, through his attorney, stated: "Defendant Cas-

sidy does not admit but does agree with all answers given by Chief Dube." (NJ/JA 115a). The testimony of Chief Dube was further substantiated by Sergeant Conley of the Camden Police Department (NJ/JA 120a-121a), Captain Philip Large of the Prosecutor's Office and Mr. Fred Albert, the official court stenographer (NJ/JA 126a), all of whom stated that no threats, promises, physical violence or assault was used.

After the State presented all of its evidence to prove the voluntariness of Cassidy's confession, the court asked of the defendant Cassidy's attorney: "Does the defendant, Cassidy, have any testimony or evidence that he desires to offer as to the voluntary nature of his confession or confessions?" (NJ/JA 138a). The defendant's attorney responded: "No, your Honor" (NJ/JA 138a); again, the court asked, "No evidence on his behalf in this respect?" (NJ/JA 138a).

Cassidy's attorney argued in his summation, "Our Prosecutor cannot say that Stanley Cassidy lied. Whatever is in this statement made by Stanley Cassidy is true. I know it is true. Of course, again my opinions are not binding upon you and my reason for knowing it is true is because of the meetings and consultations I have had with Stanley. We have been over this many, many times" (NJ/JA 270a). At the request of the defendant, Cassidy, the testimony concerning the voluntariness of his confession was not heard again before the jury (NJ/JA 205a).

As with Cassidy, the question of the voluntariness of the defendant Johnson's confession was first examined by the court outside the presence of the jury. Chief Dube stated that the defendant, Johnson, was informed of the nature of the crime under investigation and that Johnson was warned as follows:

> "I told him I wanted to ask him some questions as to what he knew of the hold-up and shooting, but be-

> fore I did ask him these questions, it was my duty to warn him that everything he told me must be truthful, and of his own free will, without any threats or promises having been made to him, and knowing that everything he told me could be used against he or any other person at some future time" (NJ/JA 184a).

Chief Dube further stated that no promises were made to the defendant and that the defendant was not physically abused or intimidated. The testimony of Chief Dube was substantiated by Detective William Neale (NJ/JA 191a), Sergeant Conley of the Camden Police Department (NJ/JA 193a), Detective William Large of the Prosecutor's Office (NJ/JA 197a), and Mr. Fred Albert, the official court stenographer (NJ/JA 203a), all of whom stated that no threats, promises, intimidation, physical violence or assault were used.

The attorney for the defendant, Johnson, presented no evidence on the question of the voluntariness of the confession (NJ/JA 204a). In his summation, Johnson's attorney alleged that the statement given to Chief Dube was true. He stated, "That statement of Johnson was truthful and honest, because when that was finished, that was the end of it" (NJ/JA 293a). He further stated, "There were no threats, there was no attempt to evade, there was no trickery" (NJ/JA 295a). At the request of the defendant, Johnson, the testimony concerning the voluntariness of his confession was not heard again before the jury (NJ/JA 205a).

Both defendants were found guilty of murder without a recommendation of life imprisonment. The death sentence followed automatically. The convictions were confirmed on appeal by the New Jersey Supreme Court (31 N. J. 489, 158 A. 2d 11 (1960)). On the appeal, no assertion was made that the confessions of Johnson and Cassidy were involuntary.

On motion for a new trial, Johnson and Cassidy alleged for the first time that their confessions were involuntary. Testimony was heard by the trial court and the relief sought was denied, 63 N. J. Super. 16, 163 A. 2d 593 (1960). On review, the New Jersey Supreme Court, after a full examination of the record, concluded the evidence proffered by Johnson and Cassidy, was untrue, and the trial court's decision was affirmed, 34 N. J. 212, 168 A. 2d 1 (1961). The United States Supreme Court refused certiorari, 368 U. S. 933, 7 L. Ed. 2d 195 (1961).

After the denial of the motion for a new trial, the defendants filed a habeas corpus action in the Federal Court where the question of the voluntariness of their confessions was again reviewed on the merits and relief denied. *U. S. ex rel. Johnson v. Yeager,* 327 F. 2d 311 (3rd Cir. 1964), certiorari denied, 377 U. S. 984, 12 L. Ed. 2d 751 (1964); *U. S. ex rel. Johnson v. Yeager,* 327 F. 2d 320 (3d Cir. 1964).

Appellants then filed Petitions for Post-Conviction Relief in the State Courts which were denied.

On appeal therefrom to the New Jersey Supreme Court, defendants, for the first time, some six years after their trial, submitted affidavits alleging a denial of a request for counsel during the police interrogation. The New Jersey Supreme Court considered the affidavits as if they were previously offered for the trial court's consideration. *State v. Johnson,* 43 N. J. 573 at 578, 206 A. 2d 737 (1965). The original petition for post-conviction relief was not supported by any affidavits (NJ/JA 12a). The petition was silent as to the State's denial of the request for counsel. Indeed attorney for petitioners, at oral argument, on the petition, conceded the petition omitted this fact (NJ/JA 26a-27a).

The New Jersey Supreme Court refused to rehear the issue of voluntariness as that issue had been fully litigated

and decided against the defendants on a prior motion for new trial.

The decision was affirmed by the United States Supreme Court in *U. S. ex rel. Johnson v. Yeager,* 384 U. S. 719, 86 S. Ct. 1772 (1966).

Appellants then filed their second petition for federal habeas corpus which was denied by the District Court.

Respondents then appealed to the United States Circuit Court of Appeals for the Third Circuit. After briefing and oral argument, this court decided *Bruton v. United States* and *Roberts v. Russell.* The United States Circuit Court of Appeals for the Third Circuit then ordered supplemental briefs and oral argument. The Third Circuit Court of Appeals then ordered the District Court to grant the "writs of habeas corpus unless, within a reasonable time, appellants are granted new trials in the State courts." (Appendix A.)

REASONS FOR GRANTING THE WRIT.

I.

The use of confessions of co-defendants was harmless error and did not contribute to defendants' convictions.

A.

Bruton v. United States is applicable but does not require a reversal where there is no prejudice to defendants.

Bruton v. United States, —— U. S. ——, 88 Sup. Ct. 1620, 36 L. W. 4447 (1968), involved a joint trial of two defendants. The confession of one which fully implicated and

named the co-defendant was admitted in evidence. Both defendants were convicted. The confessing defendant's conviction was subsequently reversed because his confession was wrongly admitted, he was then retried and acquitted. Bruton was then left convicted by a confession improperly admitted, made by a co-defendant acquitted. The United States Supreme Court found that limiting instructions were insufficient to protect constitutional guarantees. A reading of the *Bruton* case, supra, indicates a new "federal rule" requiring "effective deletion" in order to use the confession of one defendant in a joint trial of co-defendants.

This new rule is the same as the existing rule of New Jersey set forth by the New Jersey Supreme Court in *State v. Young*, 46 N. J. 152, 215 A. 2d 352 (1965); and *State v. Green*, 46 N. J. 192, 215 A. 2d 546 (1965)

The *Bruton* case, supra, was factually an obvious example of prejudice to the defendant, which could not be permitted. The Court said:

> "The Solicitor General states that this disposition is urged in part because '(h)ere it has been determined that the confession was wrongly admitted against (Evans) and his conviction has been reversed, leading to a new trial at which he was acquitted. To argue, in this situation, that (petitioner's) conviction should nevertheless stand may be to place too great a strain upon the (Delli Paoli) rule—at least, where, as here the other evidence against (petitioner) is not strong.'" (Emphasis added.) (1622.)

The prejudice to a defendant is still the issue to be determined in accordance with the existing "harmless error" doctrine.

In *Chapman v. California*, 386 U. S. 18, 87 Sup. Ct. 824 (1967), the Court faced such an issue and concluded:

"We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule. All 50 states have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.' 28 U. S. C. §2111. None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules. All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction" (22, 827).

This is the position advanced by the petitioners herein.

The Court in *Chapman v. United States,* supra, applied the harmless error rule of *Fahy v. Connecticut,* 375 U. S. 85, 86-87, 84 Sup. Ct. 229, 11 L. Ed. 2d 171, 173 (1963), wherein it was stated:

"The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. To decide this question, it is necessary to review the facts of the case and the evidence adduced at trial."

The issue, then, is a factual examination of the case, especially the confessions, to determine whether there is a "reasonable possibility that the evidence complained of might have contributed to the conviction."

B.

The confessions were substantially identical and did not contribute to the convictions below.

The Third Circuit Court of Appeals had already found the confessions to be substantially the same. In *United States ex rel. Johnson v. Yeager*, 327 F. 2d 311, 319 (1964), after a thorough examination of these confessions and the circumstances surrounding their taking, that court said:

> "The jury was instructed to consider each confession as evidence against its maker only. And here we have the additional consideration that substantially the same information was placed before the jury in the confessions of Cassidy and Johnson as in the confession of Godfrey.
>
> "In these circumstances, we think it is not reasonable to believe that the jury would, or, indeed, had any occasion to go beyond Cassidy's and Johnson's own confessions and use similar statements in Godfrey's confession against them." (Emphasis added.)

Johnson's statement said he met with Cassidy and Godfrey at Cassidy's house (J6, 7). They all discussed their need for money and robbing somebody (J8). They used Godfrey's car, Johnson and Cassidy had guns (J9-12). They passed the target store and turned right the first street after Ferry Avenue and parked (J13-14). Johnson and Cassidy walked to the store. Johnson touched a toy truck and looked at it (J15-16). They then returned to the car.

It was then decided to rob the place and take with them the truck bearing Johnson's fingerprints (J16-17). Johnson and Cassidy returned to the store, Johson announced it was a hold-up, the decedent grabbed for Johnson, Johnson started shooting the store owner (J18-20). Johnson opened the back door (J21), hurt his hand (J22), ran out and was picked up about a block and a half away from the store (J23). Johnson was dropped off at 8th and Spruce Streets (J25). Johnson did not see Godfrey and Cassidy until the next day when they took him to Newark, N. J. One Noah Hamilton was with them (J29-30). They went to Godfrey's aunt's house, where one Carswell directed them to Johnson's uncle's house, where Johnson left Godfrey and Cassidy (J32-34).

In Cassidy's confession he stated that Johnson and Godfrey came to his house about 6:00 P. M. (C8). The three of them went off in Godfrey's car to the toy store, passed it and parked on the next little street after Ferry Avenue (C9-11). Cassidy and Johnson walked to the store, asked about trains, looked for trucks and then returned to the car (C14). Cassidy and Johnson then returned to the store, Cassidy walked toward the rear, Johnson accosted the owner and the owner tried to grab Johnson. Johnson shot the man more than once. Johnson ran out the back of the store. Cassidy ran out the front to the car and Godfrey, who was waiting (C13-18).

Cassidy and Godfrey then went toward Fourth Street, saw Johnson and picked him up (C19-20). Johnson was dropped off at Eighth and Spruce Streets. Cassidy was taken to Third and Pine Streets (C20). Johnson's hand was injured and bleeding (C28). Cassidy admitted that he and Johnson were armed (C39-40). Cassidy said that he, Godfrey, Johnson and one Noah Hamilton, were together the following evening.

Godfrey's statements indicate the three defendants met at Cassidy's house, Johnson and Cassidy had guns (G7). They proceeded in Godfrey's car, past the toy store, and parked beyond the church. Johnson and Cassidy left the car, looked over the place and came back to the car (G8). Johnson and Cassidy then went back to the store. About ten minutes later, Cassidy came running back and announced that Johnson had killed the man (G8). Godfrey and Cassidy took off toward Fourth Street, where they saw Johnson and picked him up (G9). Johnson was dropped off at 8th and Spruce Streets (G9), and Cassidy at his girl's house, Henry and Berkley Streets (G10). Johnson's hand was hurt and bleeding when he returned to the car (G26).

The next day, Godfrey took Johnson to Newark, along with Cassidy and Noah Hamilton (G39-40). They went to Godfrey's aunt's house. Later, some guy directed Godfrey to a house where he dropped off Johnson (G41-44).

Concerning the relevant factual setting of the crime, the three statements are identical. They all indicate that they met at Cassidy's house, that Johnson and Cassidy had guns, and that Godfrey's car was used to drive to the toy store. They passed the store and parked on a small street just past Ferry Avenue. Johnson and Cassidy went to the store and Johnson touched a truck in the store. Johnson and Cassidy then returned to the car and it was decided to return, make the robbery and take with them the truck bearing Johnson's fingerprints. They returned, Johnson announced the hold-up, the owner grabbed for Johnson and Johnson shot him more than once. Johnson ran out the back door. Cassidy ran out the front to the car and Godfrey. Godfrey and Cassidy picked up Johnson near Fourth Street. Johnson was dropped off first at 8th and Spruce Streets and Cassidy thereafter at his girl's house

on Third and Pine Streets. They saw each other the next day when Godfrey took Johnson to Newark and Noah Hamilton went along. They went to Godfrey's aunt's house and then Godfrey took Johnson to another house. A man directed them to this house.

The participation of each defendant is identical, the facts of the way in which the crime was committed are identical. All agreed that Godfrey drove his car, Johnson did the shooting, Cassidy accompanied Johnson to the store and was also armed.

The confession of each co-defendant added nothing to the statement of the other. The jury had no reason to go beyond the statement of each defendant in order to convict, and if they did, the statements of co-defendants would contribute nothing to that defendant's own statement.

The Third Circuit Court of Appeals should have found, beyond a reasonable doubt, that the introduction of the confessions of co-defendants contributed nothing to the convictions of these defendants.

II.

This court should give further consideration to the holding in Roberts v. Russell.

Roberts v. Russell, supra, was rationally based on two concepts: that retroactivity applies where there has been a serious flaw in the fact finding at trial; and, that reliance on the old standard of *Delli Paoli* was not persuasive, because that concept had been under attack and many courts had rejected it.

A.

There had to be reliance on existing law in this 1959 conviction.

It would appear to be beyond question that any State would, in 1959, anticipate the holding of *Roberts v. Russell* in 1968. The State of New Jersey cannot be held to have anticipated the "effective deletion" rule in 1959. There was, in fact, great reliance on the existing law when this case was brought to trial.

There is no need for the new rule for the protection of the constitutional rights of New Jersey citizens. The New Jersey Supreme Court had already adopted an "effective deletion" rule for confessions in a joint trial. *State v. Young,* supra, and *State v. Green,* supra.

Assuming, therefore, the lack of real prejudice as argued in I-A and B aforesaid, there remains no rational basis for the retroactive application of *Bruton v. United States,* supra, to the case now before this court.

B.

There was no serious flaw in the fact finding process at the trial of this case.

In addition to the arguments in I-A and B aforesaid, that the confessions were substantially identical; they were admitted as true by the defendants at the time of trial.

The facts surrounding the taking of the confessions was testified to by Chief Dube of the Prosecutor's Office.

At the conclusion of Chief Dube's testimony, the defendant, Cassidy, through his attorney, stated, "Defendant, Cas-

sidy, does not admit, but does agree with all answers given by Chief Dube" (NJ/JA 115a). The testimony of Chief Dube was further substantiated by Sergeant Conley of the Camden Police Department (NJ/JA 93a-111a; 118a-121a), Captain Philip Large of the Prosecutor's Office and Mr. Fred Albert, the official court stenographer (NJ/JA 126a), all of whom stated that no threats, promises, physical violence or assault was used.

After the State presented all of its evidence to prove the voluntariness of Cassidy's confession, the court asked of the defendant, Cassidy's attorney, "Does the defendant, Cassidy, have any testimony or evidence that he desires to offer as to the voluntary nature of his confession or confessions?" (NJ/JA 138a). The defendant's attorney responded, "No, your Honor" (NJ/JA 138a). Again, the court asked, "No evidence on his behalf in this respect?" (NJ/JA 138a). The defendant's attorney stated, "That is correct" (NJ/JA 138a).

Cassidy's attorney argued in his summation, "*Our Prosecutor cannot say that Stanley Cassidy lied. Whatever is in his statement made by Stanley Cassidy is true. I know it is true. Of course, again, my opinions are not binding upon you and my reason for knowing it is true is because of the meetings and consultations I have had with Stanley. We have been over this many, many times*" (NJ/JA 270a). (Emphasis added.)

As with Cassidy, the question of the voluntariness of the defendant, Johnson's confession, was first examined by the court outside the presence of the jury. Chief Dube stated that the defendant, Johnson, was informed of the nature of the crime under investigation and that Johnson was warned as follows:

> "I told him I wanted to ask him some questions as to what he knew of the hold-up and shooting, but before I did ask him these questions, it was my duty to

warn him that everything he told me must be truthful, and of his own free will, without any threats or promises having been made to him, and knowing that everything he told me could be used against he or any other person at some future time" (NJ/JA 184a).

Chief Dube further stated that no promises were made to the defendant and that the defendant was not physically abused or intimidated. The testimony of Chief Dube was substantiated by Detective William Neale (NJ/JA 191a), Sergeant Conley of the Camden Police Department (NJ/JA 193a), Detective William Large of the Prosecutor's Office (NJ/JA 197a), and Mr. Fred Albert, the official court stenographer (NJ/JA 203a), all of whom stated that no threats, promises, intimidation, physical violence or assault were used.

The attorney for the defendant, Johnson, presented no evidence on the question of the voluntariness of the confession (NJ/JA 204a). In his summation, Johnson's attorney alleged that the statement given to Chief Dube was true. He stated, *"That statement of Johnson was truthful and honest, because when that was finished, that was the end of it"* (NJ/JA 293a). He further stated, "There were no threats, there was no attempt to evade, there was no trickery" (NJ/JA 295a). (Emphasis added.)

The trial court specifically found the confessions to be voluntary.

A motion for a new trial was made following affirmance of the conviction by the New Jersey Supreme Court (31 N. J. 489, 158 A. 2d 11 (1960)). Appellants alleged in their motion that their confessions were involuntary. A hearing was held at which time appellants were represented and had every opportunity to testify and call witnesses. The appellants did, in fact, testify as to the circumstances surrounding the taking of their statements by police (NJ/JA

223a-285a; 294a-416a), and called other witnesses in their behalf. The court fully reviewed the testimony and found the facts against appellants. *State v. Johnson,* 63 N. J. Super. 16, 163 A. 2d 593, 607 (1960).

> "To one charged with the administration of justice it is unwarranted to make the statement that perjury is forgiveable, but in this case where the extreme penalty is involved, it is understandable. This court has been sympathetic to the plight of these three young men. It has searched for the truth. It is now convinced that substantial truth rests in the record of the original trial."

The truth of these confessions and the facts of this crime have now had every imaginable test, constitutional and otherwise, and have prevailed. Now, *Roberts v. Russell* would impose on the State of New Jersey a retrial some nine years after the fact, with all the problems that necessarily creates, without any relationship to real prejudice, but merely to implement a new procedural rule which that state had already adopted.

The State of New Jersey respectfully petitions this court to re-examine *Roberts v. Russell,* which case did not envision bringing within its confines, a case such as the one now before this court.

CONCLUSION.

For the reasons and arguments aforesaid, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

A. MORTON SHAPIRO,
RUDOLPH J. ROSSETTI,
Assistant Prosecutors,
Counsel for Petitioners.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 16307 and 16308.

UNITED STATES OF AMERICA, ex rel.,
SYLVESTER JOHNSON and STANLEY CASSIDY
v.
HOWARD YEAGER, Principal Keeper of the New Jersey State Prison.

SYLVESTER JOHNSON, *Appellant in No. 16307.*
STANLEY CASSIDY, *Appellant in No. 16308.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued November 21, 1967—Reargued August 1, 1968.

Before: HASTIE, Chief Judge, and FREEDMAN and VAN DUSEN, Circuit Judges.

OPINION OF THE COURT.

(Filed August 23, 1968.)

By VAN DUSEN, Circuit Judge.

This case is before the court on appeal from a November 22, 1966, District Court order denying a petition for a writ of habeas corpus filed by appellants (two New Jersey state prisoners under sentence of death for first degree murder). We have concluded that, due to the admission of the confessions of all defendants in a joint trial under the circumstances stated below, such 1966 District Court order denying the jointly-filed petition, must be set aside and the writ granted unless a new trial or further state court proceedings consistent with this opinion take place within a reasonable time.

The relevant facts were summarized as follows by this court in *United States v. Yeager*, 327 F. 2d 311, 312-13 (3rd Cir. 1963), rehearing denied (1964), cert. den. 377 U. S. 984 (1964), in which opinion the confession of a co-defendant (Godfrey) was found to be involuntary but the confessions of appellants were found to "satisfy the constitutional standard of voluntariness" on the record then before this court:

> "The district court resolved this issue against the appellants on the basis of the evidence that was before the New Jersey courts. On this appeal we shall consider only those facts which have been found judicially or cannot reasonably be disputed in the light of the showing in the record.
>
> "At the trial the prosecution undertook to prove that the three appellants drove in appellant Godfrey's

car to a store operated by the decedent with a common purpose to commit robbery; that Godfrey remained in the car while the other two entered the store; and that in the course of the attempted robbery Johnson fatally shot the storekeeper. Thus, under the prosecution's case, as presented, it was essential to a conviction of first-degree murder that robbery be established as the objective of the enterprise. All three appellants had signed confessions admitting that their purpose was to rob the storekeeper. These confessions were essential items of proof on this issue.

"In this habeas corpus proceeding, the appellants, who do not deny the killing, contend that they were coerced into admitting that they were engaged in robbery, when in fact their purpose in going to the store was to collect a debt owed by the storekeeper to appellant Johnson.

"None of the appellants testified at the trial, either as to the manner in which the confessions were obtained or for any other purpose. The only testimony given at the trial concerning the confessions was that of the officers and stenographers who were present during the initial detention and interrogation of the prisoners or when the formal statements of the prisoners were made and transcribed. The appellants did testify, more than a year later, at a hearing on their motion for a new trial. The New Jersey courts have considered this testimony on the issue of alleged coercion, and it was properly considered by the district court in this habeas corpus proceeding."

In that opinion this court, agreeing with the District Court,[1] found the evidence did not require finding that the confessions of the appellants were coerced, which conclusion had been reached by the trial judge in 1959, the judge conducting the hearing on the motion for a new trial for the alleged after-discovered evidence (see footnote 1) and the New Jersey Supreme Court on affirming such findings and conclusions. See *State v. Johnson, supra.* After extensive litigation in the state and federal courts, some of which has been mentioned above,[2] the most recent state court "application for post conviction relief, accompanied by a fresh set of factual allegations" (*Johnson v. New Jersey, supra,* footnote 2, at 726) was filed in 1964 and resulted in refusal by the trial court of a full evidentiary hearing and its denial of relief after hearing oral argument only. On appeal to the Supreme Court of New Jersey, appellants submitted for the first time affidavits alleging denial of access to attorneys and families in support of their grounds for relief, which affidavits were treated by that court as if they had been offered for the trial court's consideration[3] (see *State v. Johnson, supra,* 206 A. 2d at 739-740), and the state trial court judgment denying this application for post-conviction relief was affirmed.[4] The Supreme Court of the United

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[1] The findings and conclusions in the opinion after the hearing on the motion for new trial on the ground of newly discovered evidence are reported in **State v. Johnson,** 63 N. J. Super. 16, 163 A. 2d 593 (1960), aff'd 34 N. J. 212, 168 A. 2d 1 (1961)—which opinion also discusses the evidence at that hearing—, cert. den. 368 U. S. 933 (1961).

[2] For the principal prior decisions involving appellants (called "a battery of collateral attacks" by the Supreme Court of the United States in **Johnson v. New Jersey,** 384 U. S. 719, 726 (1966), see **State v. Johnson,** 43 N. J. 573, 206 A. 2d 737 (1965), at footnote 1 on p. 739.

[3] The affidavits appear at pp. 365-385 of the Transcript of Record in **Johnson v. New Jersey,** No. 762, Oct. Term 1965, Supreme Court of the United States.

[4] The court held that further consideration on that appeal of the issue of the voluntariness of appellants' confessions by it was precluded by a state procedural rule.

States affirmed this judgment of the Supreme Court of New Jersey, *Johnson v. New Jersey, supra* (footnote 2) in June 1966.

In view of the recent decisions of the Supreme Court of the United States in *Bruton v. United States,* —— U. S. ——, 88 S. Ct. 1620 (1968), and *Roberts v. Russell,* —— U. S. ——, 88 S. Ct. 1921 (1968), specifically overruling *Delli Paoli v. United States,* 352 U. S. 232 (1957), relied on by the District Court, the order of November 22, 1966, must be set aside and these cases remanded to the District Court with directions to grant the writs of habeas corpus unless, within a reasonable time, appellants are granted new trials in the state courts, in accordance with the rules set forth in those cases, or further proceedings are taken not inconsistent with this opinion. In paragraphs 6 and 7 of their petitions, appellants alleged that the admission at their joint trial of "the cross-implicating statements in these confessions," as well as of the involuntary confession of their co-defendant Godfrey, violated their federal constitutional rights, in spite of the concededly careful limiting instructions of the trial judge that each confession was to be considered only in the case against the maker of such confession. The *Roberts case, supra,* contains this language at page 1921:

> "In Bruton v. United States . . ., we . . . held that, despite instructions to the jury to disregard the implicating statements in determining the co-defendant's guilt or innocence, admission at a joint trial of a defendant's extrajudicial confession implicating a co-defendant violated the co-defendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. This case presents the question whether Bruton is to be applied retroactively. We hold that it is."

In this case, the confessions varied materially on the extent of the participation of the co-defendants in the planning and execution of the crime. Johnson stated that Godfrey first gave him a gun en route to the store and that gun went off during a struggle with the proprietor. He knew Cassidy was armed and they all planned the robbery. Cassidy stated that he advised Godfrey that Johnson should not be given a gun, that Johnson shot the proprietor independently of any struggle, and that the robbery scheme was suggested by Johnson and Godfrey. Godfrey stated that the two appellants asked his advice on a "good place" to rob (G7 and 11) and that Johnson emphasized his need of money "most" (G11). After the robbery, Godfrey stated that he said to Johnson concerning the shooting, "Man, you did not have to do that" and Johnson replied, "It is one of those things" (G9). Under these circumstances, the constitutional error of admitting these confessions in evidence during a joint trial "presents a serious risk that the issue of guilt or innocence may not have been reliably determined." *Roberts v. Russell, supra,* at 1922. Also, the confessions of Godfrey and Cassidy recited hearsay statements of the appellants bearing on their degree of guilt.[5] Applying the language in *Bruton v. United States, supra,* at 1623, "Plainly the introduction of [these] confessions added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examina-

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[5] The appellants made consistent objection to the use of the confessions as a whole (310a, 378a, 403a, 428a and 606a of Joint Appendix, Supreme Court of New Jersey, Docket 2839—**State of New Jersey v. Johnson et al.**) and particularly to the parts of such confessions of the co-defendants that were hearsay (378a-380a, 405a-407a, 409a-452a and 606a of above-mentioned Joint Appendix). It is noted that, as suggested in the **Bruton case, supra,** at 1626, the appellants applied during the trial to have deleted the hearsay references to them in the confessions of their co-defendants, but such applications were denied (N. T. 409a-452a of such Joint Appendix).

tion, since [the defendants] did not take the stand. [Appellants] thus [were] denied [their] right of confrontation."

We have considered carefully appellee's argument that the use of these confessions was harmless error, since the similarity in their description of the homicide itself precluded any prejudice to appellants. *Cf. Chapman v. California,* 386 U. S. 18, 22 (1967). However, the above-described differences in the confessions[6] were very material to the jury's decision not to recommend life imprisonment and we are unable to say that the limiting instructions of the trial judge made this constitutional error harmless beyond a reasonable doubt. Cf. *Burgett v. Texas,* 389 U. S. 109, 115 (1968), where the court said:

> "The admission of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon v. Wainwright* is inherently prejudicial and we are unable to say that the instructions to disregard it made the constitutional error 'harmless beyond a reasonable doubt' within the meaning of *Chapman v. California,* 386 U. S. 18."

For the foregoing reasons, the order of the District Court, dismissing the November 1966 petition for a writ of habeas corpus, will be vacated and the case will be remanded for proceedings in accordance with the foregoing opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

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[6] The wording of the confessions does not support the allegation of appellee at p. 9 of its supplemental brief that "The participation of each defendant is identical . . . . The confession of each co-defendant added nothing to the statement of the other."